CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 512

THE UNITED STATES OF AMERICA

vs.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED OCTOBER 13, 1930

(35434)

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA

VS.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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18098—30

1 In United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT
vs.
ROBERT K. MALCOLM, APPELLEE
No. 6243

Appeal from the United States District Court for the Northern District of California

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit under section 239 of the Judicial Code

Statement of case

Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States. Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928 Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for Federal income-tax purposes. Each reported one-half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the return. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid if, as a matter of law, they had a lawful right to make such separate returns under the provisions of sections 11, 12, and 51 of the revenue act of 1928.

2 After the husband had filed his income-tax return for the calendar year 1928, as set out above, the commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly the commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the commissioner. From a judgment for this amount in plaintiff's favor, the defendant has appealed.

Questions certified

For a proper decision of the above-entitled cause, now pending on appeal and submitted for consideration, instructions are respectfully requested of the Supreme Court in the following questions of law, concerning which we are in doubt:

(1) Under the applicable provisions of the revenue act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

(2) Has the wife under section 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?

Dated October 9, 1930.

FRANK H. RUDKIN,
CURTIS D. WILBUR,
Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

(Indorsed:) Certificate of the United States Circuit Court of Appeals for the Ninth Circuit under section 239 of the Judicial Code. Filed October 9, 1930. Paul P. O'Brien, clerk.

A true copy. Attest: October 9, 1930.

[SEAL.] PAUL P. O'BRIEN, *Clerk.*

(Indorsement on cover:) File No. 35434. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 512. The United States of America vs. Robert K. Malcolm. Certificate. Filed October 13, 1930. File No. 35434.

U. S. GOVERNMENT PRINTING OFFICE: 1930



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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 512

UNITED STATES OF AMERICA

vs.

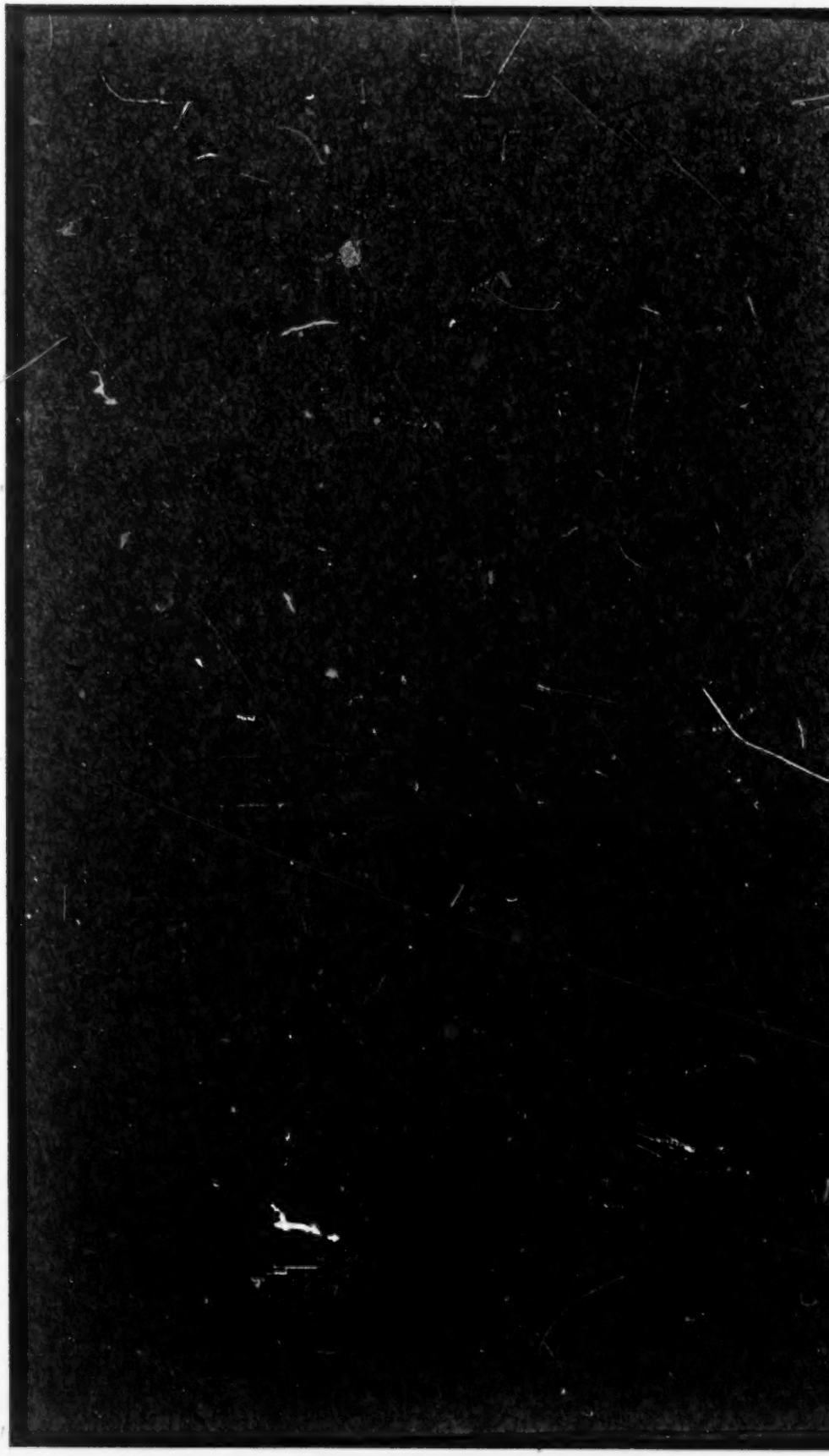
ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO ADVANCE AND TO HAVE BRIEF CONSIDERED IN OTHER CASES

KINGMAN BREWSTER,
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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 512

UNITED STATES OF AMERICA

vs.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO ADVANCE AND TO HAVE BRIEF CONSIDERED IN OTHER CASES

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

Counsel for Robert K. Malcolm, above-named, respectfully show:

This case, on certificate from the Circuit Court of Appeals for the Ninth Circuit, is a test case involving the application of the Federal income tax law to marital communities in the State of California under amendments to California statutes not applicable in *United States* v. *Robbins*, 269 U. S. 315. The question is similar to those presented in *Poe* v. *Seaborn*, No. 15, *Goodell* v. *Koch*, No. 106, *Hopkins* v. *Bacon*, No. 84, and *Bender* v. *Pfaff*, No. 86 (involving marital communities in Washington, Arizona, Texas and Louisiana, respectively), which were heard by this Court on October 21 and 22, 1930.

The four named cases were advanced by order of this Court entered May 26, 1930, on the motion of the Solicitor General, which pointed out that "this question is one of

far-reaching importance to the taxpayers in each of these states as well as to the Government and it is desirable that the question should be settled at the earliest practicable date." The same is equally true of the present case.

The brief for the taxpayer herein is already on file in this Court and contains arguments applicable to all the community property cases the Court's treatment of which in the cases from Washington, Arizona, Texas and Louisiana may materially affect its action in this case. Accordingly, it is respectfully

MOVED that this cause be advanced for hearing to some day convenient to the Court prior to the end of 1930, and it is further respectfully

MOVED that in the consideration of *Poe* v. *Seaborn*, No. 15, *Goodell* v. *Koch*, No. 106, *Hopkins* v. *Bacon*, No. 84, and *Bender* v. *Pfaff*, No. 86, this Court consider the said brief filed on behalf of Robert K. Malcolm in this cause.

KINGMAN BREWSTER,
JAMES S. Y. IVINS,
Counsel for Robert K. Malcolm.

November 3, 1930.



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FILED
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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 512

UNITED STATES OF AMERICA

vs.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ROBERT K. MALCOLM

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In the Supreme Court of the United States.

OCTOBER TERM 1930

No. 512

UNITED STATES OF AMERICA,

vs.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR ROBERT K. MALCOLM

Opinions Below

No opinion was rendered by the Circuit Court of Appeals. The District Court rendered no separate opinion, but cited certain authorities in its order for judgment, which reads as follows:

> "I find that all of the allegations of the plaintiff's complaint are true. Plaintiff's motion for judgment on the pleadings is granted upon the authority of Sec. 161a, Civil Code of California; Bacon *v.* Hopkins, 27 Fed. 2nd 140, aff'd 38 Fed. 2nd 651; Seaborn *v.* Poe, 32 Fed. 2nd 916; Bender *v.* Pfaff, 38 Fed. 2nd 642, aff'd 38 Fed. 2nd 649.
>
> "Let judgment be entered for plaintiff, with interest and costs."

Jurisdiction

The certificate of the Circuit Court of Appeals was filed in this Court on October 13, 1930.

Jurisdiction is conferred by Section 239 of the Judicial Code.

Questions Presented

As certified by the Circuit Court of Appeals, the questions presented are:

> "(1) Under the applicable provisions of the Revenue Act of 1928, must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?
>
> "(2) Has the wife under Section 161(a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?"

Statutes Involved

The relevant portions of the statutes involved will be found in the Appendix, pp. 41-48 below.

Statement

This is a test case, selected in co-operation with the Government, to determine the propriety of the present practice—authorized by Treasury Department ruling, I. T. 2457[1]—whereby a husband and wife in the State of California made separate returns of certain community income for federal income tax purposes, each reporting one-half of such community income for the year in question (1928) and each paying an income tax on that one-half.

The District Court for the Northern District of California, Southern Division, having rendered judgment in favor of the taxpayer, the Government appealed to the Circuit Court of Appeals for the Ninth Circuit, which certified the questions quoted above to this Court. The facts are as set forth in the certificate, to wit:

---

[1] VIII-1 C. B. 89. This ruling, reproduced at p. 47 below, was predicated on Section 161a of the California Civil Code, added in 1927.

"Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States. Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928 Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California, this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for Federal income tax purposes. Each reported one-half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the returns. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid if, as a matter of law, they had a lawful right to make such separate returns under the provisions of Sections 11, 12 and 31 of the Revenue Act of 1928.

"After the husband had filed his income tax return for the calendar year 1928, as set out above, the Commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly, the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner."

The questions presented involve the nature of the wife's interest in community income acquired in 1928 and the construction of the Revenue Act of 1928. The nature of the wife's interest in community income received in 1928, in the light of the amendment effective July 29, 1927 adding Section 161a to the California Civil Code has

never been determined, so far as we are advised, by any court, state or Federal, except as in the decision of the District Court herein. The construction of the Revenue Act of 1928, in the present connection, was not involved in *United States* v. *Robbins*,[2] which concerned the construction of the Revenue Act of 1918 as applied to income from property acquired *before* the amendments to the California statutes adopted by the respective legislatures in 1917, 1919, 1921, 1923, 1925 and 1926.

There is no constitutional question involved unless the Revenue Act of 1928, be construed to prohibit husband and wife, domiciled in California, from filing separate returns, each reporting half of the community income from salary. If it be so construed, a grave constitutional question arises.[3]

BRIEF OF THE ARGUMENT

I. The administrative construction of the Revenue Acts prior to that of 1928 permitted the filing of separate returns by husband and wife in community property states, each reporting half of the community income where the wife's interest in that income was present or vested. This construction was indicated in opinions of the Attorney General, adopted by the Treasury Department and published as Treasury Decisions. This departmental construction is entitled to great weight.

II. The re-enactment of the language so construed, in subsequent Revenue Acts, constituted a legislative adoption of such construction.

---

[2] 269 U. S. 315.

[3] Cf. *Towne* v. *Eisner*, 245 U. S. 418, where the Government claimed that stock dividends were taxable under the 1913 Act, which provided that net income should include "dividends,"—a case involving merely the construction of a statute,—and *Eisner* v. *Macomber*, 252 U. S. 189,—a case involving the constitutionality of the 1916 Act, which expressly taxed stock dividends.

III. The legislative intent to adopt such construction is made even more conclusive by the congressional rejection, on two different occasions, of amendments proposed by the Treasury Department for the purpose of changing the rule.

IV. The decision in *United States* v. *Robbins*[4] is not applicable to the present case. It dealt with income from property acquired before 1917, since when the California law has been materially changed. It also dealt with the Revenue Act of 1918 while this case concerns the Revenue Act of 1928, enacted in the light of departmental construction.

V. The District Courts for Washington, Arizona, Northern Texas and Eastern Louisiana, and the Circuit Court of Appeals for the Fifth Circuit, have unanimously held (in cases now pending in this Court) that where half of the community income belongs to the wife, that half is taxable to her and not to the husband.

VI. The amendments to the California statutes between 1917 and 1927 make it clear that the wife in California has a vested interest in one-half of the community property. The amendment of 1927, passed for the purpose of changing the law upon which the *Robbins* case was based, defined the interest of the wife as "present, existing and equal" to that of the husband.

The Treasury Department, by Income Tax Ruling 2457, recognized this amendment as justifying the filing of separate returns by California wives, in which one-half of the community income might be reported. The Supreme Court of California had recognized the right of the legislature, by appropriate language, to make this change in the status of the wife's interest. Accordingly, in 1928 the wife's rights in community income were at least as extensive if not more so in California than in the other community property states.

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[4] 269 U. S. 315.

The suggestion in the *Robbins* case that community income was not liable for the wife's debts, was based on an inapt paraphrase in the Government's brief of a statute which merely exempted it from her *contracts*. "Contracts" does not mean taxes. There would be no difficulty in collecting income taxes from the wife.

The Court specifically limited the *Robbins* decision to the time before the enactment of the recent California statutes.

VII. In a marital community the husband usually produces money while the wife manages the home and bears and rears the children. Both share in enjoyment of the benefits of their several labors. For social reasons the husband may be given a limited control of community property—as of the children. But it is none the less also the property of the wife just as the children are children of the wife.

The income tax is intended to distribute the burden where the benefits are enjoyed. The state law determines the benefits. It should not be interfered with by the Federal Government. The possibility that a trustee might violate his trust does not make the trust income taxable as part of his separate income. So in community property *the application of the income tax should not be predicated upon a presumption that every husband will violate the trust imposed upon him by state law.*

VIII. The argument presented on behalf of the Government is fallacious. The Attorney General in withdrawing previous opinions and authorizing this litigation did so on the ground that the questions involved are not matters of construction of the Revenue Acts of the United States but involve the question of whether a wife's share in community income belongs to her under state law. It could not have placed a new construction on the Revenue Acts without repudiating the rule with respect to re-enactment after departmental construction.

The Government is proposing a construction of the Revenue Acts different from that accepted by it for the past ten years.

Corliss v. *Bowers* involved a constitutional question only and does not support the Government's contentions in this case.

The general purpose of the Revenue Acts is not to tax income to the person having management and control but to tax it to the owner. This purpose is exemplified in the case of a limited partnership. In the case of trusts, even where the trustee pays the tax, he pays it out of trust funds and does not add the trust income to his individual income. This is true even in a "spendthrift" trust where the beneficiary has no power of alienation and no control of the corpus or income which are not subject to execution for his debts.

Lucas v. *Earl* held ineffective an attempt to avoid taxation by anticipatory assignment of income. It has no application to cases where ownership of community income is determined by operation of law. In cases of that type, the Treasury Department relies upon the rule of property obtaining in the states. Here the Government seeks to avoid the rule of property. In the converse case, the earnings of a California wife are community property. They are not liable for the husband's debts. They should not be taxed entirely to him.

The alleged inequality between states is an imagined evil, but even if real it could not be cured by judicial amendment of the statute, for Federal legislation cannot be accommodated to the diverse conditions found in the various states which necessarily work unlike results from the enforcement of the same act. The courts do not equalize state laws by modifying those of the United States. The imaginary evil is offset by other differences between the laws of the different states.

IX. Congress could not constitutionally tax the income of the wife to the husband any more than it could tax A on B's land or a privilege exercised by B.

X. The construction of the Revenue Act of 1928 contended for by the Government would render it unconstitutional. But a constitutional construction is possible and should be adopted. In case of ambiguity the statute must be construed in favor of the taxpayer.

Conclusion: The Attorney General authorized this litigation on the theory that only the construction of state laws was involved. Only thus could he avoid the rule governing re-enactments in the light of departmental construction. If only state law is involved, the California statutes, adopted between 1917 and 1927, which were not applicable in the *Robbins* case, necessitate a decision in favor of the taxpayer.

ARGUMENT

I.

The administrative construction of Revenue Acts prior to that of 1928 permitted a husband and wife in community property states, other than California, to file separate tax returns with respect to community income.

The manner in which community income was to be taxed, under all of the revenue acts prior to that of 1928, the latter applicable to this case, depended upon the construction of the words "upon the net income of every individual." The Revenue Act of 1928 used language identical with that of prior acts.[5] Therefore, the administrative construction placed upon these words in the earlier acts should be thoroughly considered.

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[5] cf. Sections 210 and 211 of the Revenue Acts of 1926, 1924, 1921, 1918; Section 1 of the Revenue Acts of 1917, 1916; Section A of the Revenue Act of 1913.

In the year 1920, the Attorney General rendered to the Secretary of the Treasury an opinion[6] in which the subject of the reporting of community income by a husband and wife, domiciled in *Texas*, was exhaustively considered. This was published by the Treasury Department as Treasury Decision 3071.[7] The Attorney General, after considering thoroughly the statutes and decisions of Texas, affecting community property, concluded as follows:

> "(1) The earnings of husband and wife domiciled in Texas are community income, and such husband and wife in rendering separate income-tax returns may each report as gross income one-half the total earnings of the husband and wife.
>
> "(2) The income from separate property, except the increase, rents and revenues from lands, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from separate property, except the increase, rents and revenues from land held separately.
>
> "(3) The income from community property as defined in article 4622, Vernon's Sayles' Statutes, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income-tax returns, may each report as gross income one-half the total income from such community property."

Early in 1921, at the request of the Secretary of the Treasury, the Attorney General rendered another opinion[8] in which the subject of tax returns of community income was considered with respect to the states of Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Washington, which, with Texas, comprise the eight states

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[6] 32 Op. A. G. 298.
[7] C. B. No. 3, page 221.
[8] 32 Op. A. G. 435.

in which the community property system prevails. This opinion was published by the Treasury Department as Treasury Decision 3138.[9]

After a thorough consideration of the statutes and decisions of these seven states, it was there ruled that a husband and wife, domiciled in any of them except California, in rendering separate income tax returns, might each report in gross income one-half of the income which under the laws of the respective states becomes, simultaneously with its receipt, community property. The basis for the Attorney General's conclusion was that in those community property states, with the exception of California, their own Courts had held that a wife has, during the existence of the marriage relation, an "existing, present interest" in one-half of the community property "equal to that of the husband." The exception in the case of California was made because (quoting from the opinion) "the rule established by the highest Courts of that state is that during coverture the wife has no vested interest in the community property, her interest therein being a mere expectancy."

These opinions of the Attorney General interpreted the Revenue Act of 1918, but were expressly stated to apply under prior income tax acts. The Treasury Department, in pursuance of such rulings, accepted separate returns of community income from husbands and wives in all the community property states other than California.

Under circumstances such as these, this Court has invariably applied the rule, stated in *United States* v. *Johnston*,[10]

> "that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and

[9] C. B. No. 4, page 238.

[10] 124 U. S. 236, 8 S. Ct. Rep. 446, 455.

should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

The rule was applied by this Court in at least three cases at the last term.[11]

II.

The enactment of the Revenue Act of 1928 constituted a legislative adoption of the administrative construction of similar language in prior acts, permitting separate returns of community income wherever the wife's interest is present, existing and equal to the husband's.

For almost a year prior to the enactment of the Revenue Act of 1921, the Attorney General and the Treasury Department had construed the Revenue Act of 1918, and prior revenue acts, as permitting a husband and wife in community property states (except California) to render separate returns in which community income was equally divided between them.

The Congress that enacted the 1921 Act considered this known practice and not only made no express reference to the taxation of community income but again imposed normal and surtaxes "upon the net income of every individual." Likewise, three years later, and knowing that the Treasury Department had construed the 1921 Act as permitting separate returns of community income, Congress passed the 1924 Revenue Act and once more used the language imposing taxes "upon the net income of every individual." The same provision was repeated in the enactment of the Revenue Acts of 1926 and 1928.

It is, therefore, submitted that the language, "upon the net income of every individual," is not ambiguous.

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[11] *Brewster* v. *Gage*, 280 U. S. 327, 336; *United States* v. *Jackson*, 280 U. S. 183, 193; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583.

It means: the net income *belonging* to every individual.[12] But even if it be assumed to be doubtful in its meaning, standing alone, it must be held to have obtained a definite meaning, as applied to community income, certainly not later than the date of enactment of the Revenue Act of 1924.

This Court has held in numerous cases that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the Department charged with its execution, and that the re-enactment by Congress, without change, of a statute which had previously received long-continued departmental construction, is an adoption by Congress of such construction.[13]

A case frequently cited by the Government is that of *National Lead Co.* v. *United States*,[14] where it was held:

> "The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive

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[12] See the opinion of Acting Attorney General Mitchell, July 16, 1927, 35 Op. A. G. 265, in which the following statement appears:

"The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income *belongs* to him, and to prevent the wife from returning a share of the community income as her own, unless that share *belongs* to her * * *." (Italics supplied.)

[13] *United States* v. *Johnston*, 124 U. S. 236, 253;
United States v. *Sweet*, 189 U. S. 471, 473;
Copper Queen Mining Co. v. *Arizona Board of Equalization*, 206 U. S. 474, 478;
United States v. *Hermanos*, 209 U. S. 337, 339;
Komada & Co. v. *United States*, 215 U. S. 392, 396.

[14] 252 U. S. 140, 146.

construction of the statute, *United States* v. *Philbrick, supra; United States* v. *G. Falk & Brother*, 204 U. S. 143, 152; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337; for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. *United States* v. *Bailey*, 9 Pet. 238, 256."

The case most nearly parallel with the one under consideration is *United States* v. *G. Falk & Brother*,[15] in which the Court said:

> "And the Attorney General's opinion can not be overlooked. The proviso which he construed in section 50 of the act of 1890 was reenacted in section 33 of the act of 1897. It would be extreme to hold that Congress by doing so intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed."

In the recent case of *Lash's Products Co.* v. *United States*,[16] Mr. JUSTICE HOLMES made the following statement:

> "* * * if the statute were taken literally, as there would be no reason for not taking it *if it were now passed for the first time*, there might be difficulty in accepting the Commissioner's distinction even if the tax were made a separate item of the bill. But if, in view of the history in the Solicitor General's brief, we assume with him that the practice of the Commissioner has been ratified by Congress, we agree with his argument that the petitioner must take the privilege as it is offered." (Italics supplied.)

The force of this rule of statutory construction is perhaps best illustrated by the fact that in *United States* v. *Hermanos, supra*, Mr. JUSTICE WHITE and Mr. JUSTICE PECKHAM were constrained to concur *solely because of the*

[15] 204 U. S. 143, 150.
[16] 278 U. S. 175.

prior administrative construction, notwithstanding they evidently disagreed with the correctness of the department's previous interpretation.

This great principle of construction has been the mainstay of the Government in innumerable tax cases.[17] It is interesting to note that the Government's briefs in the various cases similar to this, presented to this Court at the current term, are completely silent as to this principle, though stressed by the taxpayers in the lower courts. Is this silence equivalent to a suggestion that the Court *repudiate* the rule?

III.

The legislative intent is further demonstrated by the refusal of Congress to adopt amendments proposed by the Treasury Department for the purpose of changing the rule.

The opinion of the Attorney General with respect to Texas was given in 1920; that with reference to the other states was rendered in February, 1921. The Revenue Act of 1921 was enacted in November of that year.

When the bill which became the Revenue Act of 1921 was pending in Congress, the Treasury Department, for reasons of policy, sponsored an amendment which was intended to change for the future the rule of the 1918 and prior revenue acts as interpreted by the Attorney General and as applied by the Treasury Department.

The bill which was sent to the Senate by the House contained an amendment providing that:

> "Income received by any community shall be included in the gross income of the spouse having the *management* and *control* of the community property." (Italics supplied.)

This amendment had been adopted by the Ways and Means Committee at the instance of the Treasury De-

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[17] e. g., in *Brewster* v. *Gage*, 280 U. S. 327, 337.

partment and was passed by the House without discussion. The Senate Finance Committee made certain changes in the amendment.

When the bill came before the Senate, the Treasury's amendment was vigorously opposed by the senators from the community property states. An amendment offered by Senator Broussard of Louisiana to strike out the proposed community property amendment was unanimously adopted. This was later concurred in by the House, and the Act of 1921 became a law without the Treasury's proposed amendment. Like prior acts, it merely imposed the tax "upon the net income of every individual."

Following the passage of the 1921 Act, the Treasury Department recognized that whatever might be the power inherent in Congress to tax community income to the spouse having the "management and control" of the community property, the Congress which passed the 1921 Act had unmistakably and affirmatively declined to attempt to exercise such power. The Treasury Department, therefore, interpreted the 1921 Act in the same manner that the 1918 and prior acts had been interpreted, and continued to accept without question separate returns of community income from husbands and wives in all of the community property states other than California.

In 1924, when the revision of the revenue law was again before Congress, the Treasury Department once more attempted to have a provision inserted which provided as follows:

> "Income received by any marital community shall be included in the gross income of the spouse having the *management* and *control* of the community property and shall be taxed as the income of such spouse." (Italics supplied.)

Again emphatic opposition led to its defeat, and the Revenue Act of 1924, like that of 1921 and the prior acts, imposed the tax "upon the net income of every individual."

If the construction of an ambiguous statute given to it by the executive department charged with its administration will be given great weight, and the re-enactment by Congress, without change, of such a statute is an adoption by Congress of the Departmental construction, *a fortiori* should the departmental construction be held to have been adopted by Congress when it also definitely, on two separate occasions, rejected an amendment proposed by the Treasury Department and designed to overturn the existing rule.

IV.

The decision in the Robbins case distinguished

The case of *Robbins* v. *United States*[18] was litigated for the purpose of testing the validity of the Attorney General's ruling with respect to California. The District Court gave judgment for the taxpayer. The Government appealed to this Court, which, in January, 1926, decided in favor of the Government.

The question presented in the *Robbins* case was whether Mr. Robbins, domiciled in California, was required, under the Revenue Act of 1918, to return and pay a tax on community income *received during the year 1918 from property acquired before 1917*, as the Government contended, or whether he and his wife might file separate returns, each of one-half, as the taxpayer contended.

The theory upon which the Government, the taxpayer and the District Court all proceeded was that the case turned upon the character of the interests of the respective spouses in community income, and that this was determinable only in the light of the existing and effective statutes and decisions of California.

Considerable argument was devoted to the question whether a wife in California had a vested or present, existing and equal interest in community property during

[18] 5 Fed. (2d) 690; 269 U. S. 315.

coverture, as some of the California decisions seemed to indicate, or whether, during the marriage, she had a mere expectancy, as other California decisions appeared to hold.

This Court had held that in the states of Washington[19] and New Mexico,[20] a wife has vested rights in community property during coverture. In the *Robbins* case it was the position of both parties that if the wife had a vested interest in the community property under the laws of California, the husband was not obligated to return more than one-half of the community income, whereas if the wife's interest was less substantial and constituted a mere expectancy, the husband was obligated to return the entire community income *as his income.*

The Government, of course, urged that the wife had a mere expectancy. This Court took the view that under the decisions of the Supreme Court of California, and the applicable statutes, the community income *received during 1918 from property acquired before 1917*, was property in which during the year Mrs. Robbins had a mere expectancy; also that *Arnett* v. *Reade*, *supra*,[21] would not be followed in California.

Therefore, this Court *decided*, as we read its opinion, *merely* that this community income, *received in 1918*, was taxable entirely to the husband *because* it was the income *of* the husband under the California statutes and decisions then controlling.

It is entirely unnecessary for the taxpayer in the case at bar to question the correctness of the decision in the *Robbins* case—we submit that it is readily distinguishable in view of various amendments to the California statutes especially section 161a of the Civil Code, added in the year 1927, which are discussed later in this brief.

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[19] *Warburton* v. *White*, 176 U. S. 484.
[20] *Arnett* v. *Reade*, 220 U. S. 311.
[21] And, presumably, *Warburton* v. *White*, *supra.*

In deciding the *Robbins* case, the Court adopted the view of California statutes and decisions which had been taken by the Attorney General in his opinion rendered in 1921,[22] namely, that a wife in California did not have a vested or present right in community property during coverture, but a mere expectancy. The Court also accepted the Attorney General's construction of the Revenue Act of 1918, as applied to California.

The re-enactment in 1921 and 1924 of the statutory provision, in the light of departmental construction, of course, had no retroactive effect upon the meaning of the *1918 Act*,[23] and was accordingly ignored by this Court in the 1918 case—but now the Court is concerned with the construction of the *re-enactments*.

The *Robbins* case involved the construction of the Revenue Act of *1918*. If that Act (instead of the 1928 Act) were applicable to the instant case the taxpayer might be confronted with the secondary line of reasoning set forth in the concluding paragraph of the *Robbins* opinion. But even if it be assumed for the purpose of the argument that the Court there took the view, in effect, that the Attorney General was wrong in his construction of the *1918* Act with respect to states other than California, we submit that it does not follow that the *1928* Act should be construed as prohibiting separate returns in the case of husband and wife domiciled in California or in any other community property state.

As we have shown above,[24] the Revenue Acts of 1921, 1924, 1926 and 1928 were enacted in the light of departmental construction, and the continuance of the language construed constitutes a legislative adoption of that construction. Also the Congressional rejection of amend-

[22] 32 Op. A. G. 435, C. B. 4, page 238.
[23] cf. *Shearer* v. *Anderson*, 16 Fed. (2d) 995.
[24] Point II.

ments proposed for the purpose of changing the rule[25] indicates, beyond peradventure, the legislative intent to continue the enforcement of the law as then construed—permitting the taxation of community income to husband and wife equally wherever the wife's interest is a present, existing and equal one.

Regardless of the correctness of the departmental construction of the 1918 Act as applied to 1918 income, that construction was the basis of the *subsequent* legislation and in its light must such subsequent legislation be read.

V.

Test cases from the states of Washington, Arizona, Texas and Louisiana, now awaiting decision by this Court, have all been decided in favor of the taxpayer by the lower courts.

The *Robbins* case related only to California, but this Court used language in its decision in that case which the Government deemed sufficient to justify placing before the Courts in test cases the question as to the validity of its long-standing practice of permitting separate returns of community income in the seven other community property states. Hence, while the Government continued to allow the filing of separate returns, it has tested the question in four different jurisdictions,—Washington, Arizona, Texas and Louisiana.

The Washington case, *Seaborn* v. *Poe*, was decided by District Judge Cushman in favor of the taxpayer.[26] It was certified by the Circuit Court of Appeals for the Ninth Circuit and is now pending decision by this Court, together with the cases from the other three states. The Arizona case, *Koch* v. *Goodell*,[27] was decided in favor of the

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[25] cf. Point III.

[26] 32 Fed. (2d) 916.

[27] The District Court decision appears not to have been reported.

taxpayer by the District Court for Arizona and was also certified to this Court by the Circuit Court of Appeals for the Ninth Circuit.

The Texas case, *Bacon* v. *Hopkins*,[28] and the Louisiana case, *Pfaff* v. *Bender*,[29] were decided in favor of the taxpayers by the District Courts for the Northern District of Texas and the Eastern District of Louisiana respectively and were both affirmed by the Circuit Court of Appeals for the Fifth Circuit.[30]

The Government's sole reliance in these test cases has been upon the concluding paragraph of the *Robbins* opinion, but these five different Courts have been unanimous in the view that the *Robbins* decision is not applicable.

The reasoning underlying these decisions is the same as that of Attorney General Palmer in his 1920 and 1921 opinions referred to above, namely, that half of the community income in such states is the income of the wife, taxable to her because the statute imposes the tax "upon the net income of every individual."

VI.

The amendments to the California statutes give to the wife a vested interest in half of the community income for 1928, which is a real ownership, quite different from her interest in the income discussed in *United States* v. *Robbins*.

The question dealt with in the *Robbins* case was the nature of the wife's interest in income *from property acquired before 1917*. As pointed out by the District Court in its exhaustive opinion in that case[31] the decisions of the California courts with respect to the nature of the wife's interest in community property were in great

[28] 27 Fed. (2d) 140.
[29] 38 Fed. (2d) 642.
[30] 38 Fed. (2d) 651 and 649, respectively.
[31] 5 Fed. (2d) 690.

confusion. While some of those decisions *described* her interest as a mere expectancy, their *effect* was to hold it to be much more than that.

The California legislature, commencing in 1917, has eliminated the doubts by a series of amendments all designed to limit the husband's dominion and control or increase the wife's rights and take them out of the category of "a mere expectancy."

In 1891 the California legislature had amended section 172 of the Civil Code by adding thereto a proviso providing that the husband could not make a gift of the community property or a conveyance thereof without a valuable consideration unless the wife in writing consented thereto. In 1917 the subject matter of this section 172, which till then covered real and personal community property was subdivided into two sections, 172[32] covering personal and 172a[33] covering real community property. The restriction on gifts of community personal property was retained in section 172 as amended in 1917. Section 172a, added at the same time, made the wife a necessary party to any conveyance or encumbrance of community realty in excess of a lease for one year. The amendment of 1923 to section 1401[34] of the Civil Code made clear the wife's right to testamentary disposition of her half of the community property subsequently acquired (*McKay* v. *Lauriston*, 204 Calif. 557) and provided a rule of succession in default of such testamentary disposition. The inheritance tax act of 1917 and the amendment thereto of 1921[35] made it clear that the surviving wife was not subject to inheritance taxes on her share of the community, and the amendment of 1925[36] perfected this right

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[32] See Appendix, p. 44.
[33] See Appendix, p. 44.
[34] See Appendix, p. 45.
[35] See Appendix, p. 46.
[36] See Appendix, p. 47.

in her even where the husband by will forced her to elect between a bequest and her statutory ownership.

The *Robbins* case was decided in 1926, and in 1927 the California legislature, obviously for the purpose of changing the law on which that decision was based, enacted a succinct amendment to the Civil Code. This amendment, approved by the Governor April 28, 1927, in effect July 29, 1927, reads as follows:

> "Section 1. A new section is hereby added to the Civil Code to be known as section 161a thereof to read as follows:
>
> "161a. The respective interests of the husband and wife in community property during continuance of the marriage relation are *present, existing and equal* interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property." (Italics supplied.)

It was this amendment which brought about a change in the Government's practice with respect to accepting income tax returns from California taxpayers, and resulted in the publication of Treasury Department ruling known as I. T. 2457.[37] It is the validity of its own ruling which the Government is attacking in this case.

Section 161a has been referred to in the decisions of the Supreme Court of California on only one occasion. In *Stewart* v. *Stewart*,[38] that Court said:

> "This section of the code, whatever effect it may have upon community property acquired subsequent to its effective date, cannot in any manner relate to or govern the ownership of property acquired prior thereto."

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[37] See Appendix, p. 47.

[38] 204 Cal. 546, 556 (July, 1928, the second decision in this case).

In its first decision in the case of *Stewart* v. *Stewart*,[39] the Supreme Court of California had occasion exhaustively to review its prior decisions upon the subject of community property. It was urged to accept the view that certain amendments to the Civil Code made by the California Legislature in 1917 had changed the nature of the interest of a wife in community property during the marriage. The Court declined to give that effect to the 1917 amendments, but clearly indicated such a result could be accomplished by appropriate language. In its decision the California Supreme Court made the following statement, which is particularly pertinent here (pp. 339–343):

> "The legislature in framing these two amendments which, taken together, worked a revision of the former section 172 of the Civil Code did not state therein 'in plain language,' as it was pointed out in the second Spreckels case it might easily have done, 'that the purpose of these amendments was to *vest* in the wife during the marriage a *present interest* or estate in the community property.' * * * *Had the legislature seen fit to so declare in the language employed by it in the coincident statute, no doubt could have existed as to its intent to work such a radical change in the former and long-established status as to render the interest of the wife in the community property thereafter to be acquired a present vested estate and interest therein from the date of its acquisition.* The legislature did not do this nor anything like it. * * * We are, therefore, clearly of the opinion that the amendments to the Civil Code, adopted in 1917, did not operate to change such rule to the extent of creating in the wife a present vested interest in the property of the community during the continuance of the marriage relation.
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> "* * * Having made and persisted in its own interpretation of these originals through all these years and having by so doing created and consist-

[39] 199 Cal. 318 (Sept. 1926).

ently adhered to such interpretation as to render the same a fully established rule of property *it is for the legislature*, but not for this court, *to depart from such rule.* Up to and including the year 1917 the legislature has not, in our opinion, seen fit so to do. The parties to this action acquired the property affected by this litigation during the year 1918. It being admitted that the property then became and has since been community property, the respective rights of the said parties thereto, in so far as those rights do or do not amount to vested interests therein, must be determined by *the state of the law at the date of their acquisition of said property.* * * * *We wish to say in conclusion that we are in accord with the intimations from time to time reflected by this court in the long line of its past decisions to the effect that the interest of the wife* in the property of the community during the continuance of the marriage relation while it *has not yet reached* the status of a vested interest therein, *is and has always been from a time reaching back into the Spanish and Mexican originals of our community property laws a much more definite and present interest than is that of an ordinary heir.* She has, by virtue of the share which in her own sphere she has contributed toward the acquisition and conservation of such properties, rights therein which have been always safeguarded against the fraudulent or inconsiderate acts of her husband with relation thereto and for the assertion and safeguarding of which she has been given access to appropriate judicial remedies both before and after the time when her said rights and interests would ripen and become vested through the death of the husband or other severance of the marriage relation whenever such rights and ultimate interests were affected by or threatened with such forms of invasion." (Emphasis supplied.)

We have quoted thus at length from the first opinion in *Stewart* v. *Stewart* for the purpose of showing that the Supreme Court of California clearly recognized the right of the legislature of that state to "*vest* in the wife during

the marriage a present interest or estate in the community property." That the California Legislature used proper language, in section 161a, to effectuate such a result, is clear from the wording thereof,—"present, existing and equal interests."

By virtue of section 161a, the wife now has a present interest, during the continuance of the marriage, *equal to that of her husband*, in community property acquired after July 29, 1927. Accordingly, it seems clear that the situation on which the Court based its decision in the *Robbins* case no longer exists. The ambiguity which caused the Attorney General to distinguish between California and the other community property states in the early opinions was definitely eliminated by the enactment of 1927, and in California a wife's interest in community property is at least as great if not greater than in the other seven states covered by the opinions.

The particular community property here under consideration is the husband's salary, which becomes community property simultaneously with its receipt. Even before its receipt the husband is prohibited from making any assignment thereof.[40] After its receipt the husband cannot make a valid gift for any purpose whatsoever, or encumber it, without the written consent of the wife;[41] the wife has a legal right to make testamentary disposition of one-half thereof;[42] the wife's interest is present, existing and equal with that of the husband.[43] In no other community property state does a wife have greater interest in the salary of her husband.

It seems clear that under the California statutes as they appear today, it can no longer be said that the husband may spend the community income

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[40] Civil Code § 955.
[41] Civil Code § 172.
[42] Civil Code § 1401.
[43] Civil Code § 161a.

> "substantially as he chooses, and if he wastes it in debauchery the wife has no redress."

The suggestion in the opinion of this Court in the *Robbins* case that

> "the fund taxed, while liable to be taken for his [the husband's] debts, is not liable to be taken for the wife's, Civil Code § 167, so that the remedy for failure to pay might be hard to find"

was, we respectfully suggest, based upon an inapt paraphrase of the statute which appeared in the Government's brief in that case.[44] *Section 167 does not exempt the community property from liability for the wife's debts*, but from liability for her *contracts* made after marriage.[45] *The term "contracts" certainly does not include liability for taxes.* Furthermore, a state statute must yield to a Federal one. Florida, for example, might pass a statute exempting all property from every income and estate tax, but could not thus defeat the enforcement of the Federal Revenue Acts within her borders.

The interest of a California wife in community property, being now present, existing, and equal to that of her husband, there certainly can be no difficulty in enforcing against it a Federal tax assessed upon her.

This Court in the *Robbins* opinion was careful to limit its ruling to the income from property acquired before 1917, and in finding that the wife's interest was a mere expectancy, particularly stated

> "at least with reference to the time before the later statutes."

The situation in 1928 was quite different.

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[44] p. 57 of Government's brief in #493, October Term 1925: "As to debts of the wife contracted subsequent to marriage, the community estate is not liable, Sec. 167, Civil Code."

[45] The Code section reads: "The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband."

VII.

The application of the tax should not be predicated upon a presumption that every husband will violate the trust imposed upon him by the laws of the state.

The theory underlying the community property law seems to be that the husband and wife pool their interests and work for the common good of the community. The husband's efforts usually produce the money while the wife usually manages the home and bears and rears the children. Her efforts are as valuable to the community as his. She participates equally with him in the burdens, and should participate equally in the resulting benefits. The situation is parallel to that of a partnership in which one partner furnishes capital and the other skill.

For social reasons, the husband may be given a limited control of the community property, just as in most jurisdictions he is given the right to control the joint domicile, and the children. It is just as reasonable to say that the community income is the income "of" the husband and wife, equally, in spite of the control by the husband, as it is to say that the children are the children "of" both husband and wife, in spite of a similar control by their father.

It is always claimed that the income tax is more just than other forms of taxation because it tends to distribute the burden of taxation where it should most equitably be borne—theoretically at least—by reference to benefits enjoyed. Those benefits must be determined in the light of the state laws governing their enjoyment. If a state vests in the wife the enjoyment of a share of the husband's earnings, to offset his enjoyment of the result of her efforts, is that a matter which, under the Constitution, should be interfered with by the Federal government?

The control by the husband over community property is not given nor expected to be exercised for his separate benefit, but for the benefit of the community, just as the control vested in a trustee is not for the benefit of the trustee but that of the cestui que trust.[46] The possibility that a trustee might violate his trust, and, because of his insolvency, or the insufficiency of provided remedy, the beneficiary might be without actual redress, does not render the trust income a part of the trustee's separate income for purposes of taxation.

Similarly the fact that a husband might deprive his wife of her share of community income should not render that share a part of his separate income for the purpose of computing the income tax.

The application of the tax should not be predicated upon a presumption that every husband will violate the trust imposed upon him by the laws of the state.

VIII.

The argument presented on behalf of the Government is fallacious.

Ownership or Control

In its briefs filed in the other four community property cases before this Court, the Government has made the same arguments under "Point II," basing its contention upon a suggested construction of the language "the net income of every individual" contained in the Revenue Acts. In doing this, as we have shown above,[47] it has in effect repudiated the rule applied to re-enactments in the light of departmental construction, although that rule

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[46] The power of revocation, in *Corliss* v. *Bowers*, was reserved for the benefit of the grantor, justifying a tax upon him in the light of the reservation.

[47] p. 11.

has been the mainstay of the Government in innumerable cases. It should be noted that the *Robbins* case was presented to this Court by Mr. Solicitor General Mitchell in December 1925, and that Mr. Mitchell, as Acting Attorney General, in his opinion of July 16, 1927,[48] commenting on the *Robbins* case, said:

> "*The questions involved are not matters of construction of the Revenue Acts of the United States*, but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income *if that income belongs to him*, and to prevent the wife from returning a share of the community income as her own unless that share *belongs to her*. Neither the opinions of the Attorney General upon this subject nor the rulings of the Treasury Department have been based on any interpretation of the Acts of Congress. The nature and extent of the wife's interest in community income in any of these states is to be determined from the statutes and decisions of the state." (Italics supplied.)

This makes it clear why Attorney General Mitchell was willing to withdraw the opinions of his predecessors after Congress had repeatedly re-enacted the same language in the light of those opinions. His belief was not that they had misconstrued the Federal statute but that possibly they had misconstrued the state laws and misapprehended the true nature of the wife's interest in community property. He therefore felt justified in authorizing litigation to determine the nature of that interest under the respective state laws.

It is, therefore, rather surprising to find counsel for the Government basing their first contention upon a construction of the Federal statute totally different from that

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[48] 35 Op. A. G. 265, 266.

which was adopted by Attorney General Palmer[49] in 1920–21, which was accepted by the Treasury Department in its regulations ever since, and by Attorney General Mitchell after the decision in the *Robbins* case, and which Congress twice refused to change by legislation.

For at least ten years it has been universally understood that the word "of" in the phrase "the net income of every individual" means "belonging to."[50] Nevertheless, the Government's counsel in their briefs state:

> "* * * Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership."[51]

CORLISS *v.* BOWERS DISTINGUISHED

The Government's counsel rely on *Corliss* v. *Bowers*,[52] which held that Congress might constitutionally tax the grantor of a revocable trust upon the income from the trust fund. In that case there was no question of statutory construction, the act being unmistakably clear. The grantor had, by reserving the right to revoke, reserved in himself the power of resuming his ownership at any time. In effect, by refraining from revoking the trust, he made a separate gift of each item of income as it accrued. The case has nothing in common with the community property question except that the language of the court stating that "The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved [citations]", makes it clear that under the 1923 amendment to the California Civil Code[53] if the husband upon the death of the wife does eventually be-

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[49] 32 Op. A. G. 298 and 435.

[50] cf. footnote 12, p. 12, supra.

[51] See p. 11 in Government's briefs in each of Nos. 15, 84, 86, and 106.

[52] 281 U. S. 376.

[53] § 1401, see Appendix, p. 45.

come the owner of her half of the community income, his acquisition is attributable to the wife's failure to exercise the power of testamentary disposition.

Examples of Control or Ownership

The Government's brief[54] states that "taxation of income to the person who controls and enjoys it rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts." In support of this statement the *Corliss* case is again cited although there certainly the actual enjoyment was in the beneficiary and it was only a potential enjoyment that was made the grounds for taxing the grantor. Furthermore, in that case there was no ambiguity as to the congressional intent.

The general purpose of the Revenue Acts is not to tax income to the person having the management and control thereof, but to the *owner*. An example is the case of a special or limited partnership, which more nearly resembles a marital community than does any other legal arrangement we can cite. The general partners only have authority to transact the business of the firm,[55] they may sue and be sued alone,[56] their liability is unlimited,[57] and the special partner is liable for firm debts only to the extent of his contribution.[58] But the Government has never suggested that a general partner must add to his own taxable income the special partner's share of the firm's profits. On the contrary, it is taxed to him, *whether distributed or not*, even though he cannot compel distribution.[59]

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[54] In the other community property cases.

[55] California Civil Code § 2489, see Appendix p. 46.

[56] California Civil Code § 2492, see Appendix p. 46.

[57] California Civil Code § 2500, see Appendix p. 46.

[58] California Civil Code § 2501, see Appendix p. 46.

[59] Revenue Act of 1928, Sections 181–189; Regulations 74, Articles 901–942.

The only instance the Government attempts to cite, where the manager rather than the owner of income is taxed is that of a trustee in a case where the income is not distributable to the beneficiaries. It is true that income held for future distribution is not taxed to the beneficiary. It would work a great hardship on him to make him pay a tax out of income he could not yet receive. It is also true that income accumulated in trust for unascertained persons is taxed to the fiduciary—because it could not be taxed to the beneficiary without ascertaining him. It is not, however, taxed to the trustee by reason of being *his*, under the provision taxing "the net income of every individual"—those words having been specifically held insufficient to reach such income[60]—but by special stuatutory provisions not applicable to marital communities.

Accordingly when a trustee is taxed upon trust income, the tax is not measured by reference to the trustee's separate income, but by reference to the income of the trust as an entity.[61] The powers of trustees vary in different states and under different trust instruments—but no attempt is made to equalize them under Federal tax laws.

The same is true of an executor administering a decedent's estate. The fiduciary makes a special form of return for the trust or estate, but he does not add the income of the trust or estate to his own income and accordingly increase the tax on his own income by putting it into higher graduated rates. In the case of a "spendthrift trust" the beneficiary has no control of the property or income, they are not subject to execution for his debts, he cannot alienate his rights—but the income is not added to that of the trustee. The trust is the subject of

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[60] *Smietanka* v. *First Trust and Savings Bank*, 257 U. S. 602.

[61] cf. *Knowlton* v. *Moore*, 178 U. S. 41, where this Court held that tax rates on legacies should be determined by reference to the size of the legacies, not the size of the estate.

a fiduciary return, with a separate exemption and tax rates dependent upon its own income regardless of the trustee's income or any other income of the beneficiary. The resulting taxes, instead of being higher are even lower than would be paid by a California wife reporting one-half of the community income on the same return with her separate income. If a husband is to be likened to a trustee of his wife's share of community income, he should make a separate return for that income and not add it to his own.

Lucas *v.* Earl Distinguished

The Government next relies on *Lucas* v. *Earl*[62] where this Court refused to regard a contract, which was, in effect, an anticipatory assignment of income, as a successful method of avoiding a part of the income tax on a husband's salary.

The Treasury Department has always insisted that one cannot avoid taxation upon his earnings by anticipatory assignment thereof.[63] The decision in the *Earl* case upholds this departmental construction of the statutes. But the Treasury Department has always distinguished between such cases of voluntary assignment and community property cases, where ownership of community income is determined *by operation of law*. Congress, in re-enacting the same language in the various statutes, adopted the distinction, and ratified the different rules in the two respective situations.

In the last paragraph of its opinion in the *Earl* case, the Court said:

> "But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who

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[62] 281 U. S. 111.

[63] cf. *Mitchel* v. *Bowers*, 15 Fed. (2d) 287; *Bing*, v. *Bowers*, 26 Fed. (2d) 1017.

earned them *and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.* That seems to be the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." (Italics supplied.)

We assume that the basis for the language which we have italicized is the acknowledged power of Congress, within limits, to "prevent evasion and give practical effect to the exercise of admitted power"[64]—in short, to preserve the normal incidence of the tax. It will be noted that the Court was speaking generally of "*arrangements and contracts*" of individuals designed to escape the normal incidence of the tax. The present community property law of the State of California is neither such an "arrangement" nor such a "contract." It creates property rights to which the normal incidence of the tax attaches. There is nothing in the language of the *Earl* decision overruling the well-settled principle that the Federal Courts will follow the state decisions interpreting state laws governing property rights.[65]

If the effect of the *Earl* decision is limited to such individual "arrangements and contracts," as we under-

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[64] *Nichols* v. *Coolidge*, 274 U. S. 531, 542.

[65] The rule was stated by Acting Attorney General Mitchell, in his opinion of July 16, 1927, *supra*, as follows:

> "In determining the nature of an interest in community income created by State law, it is necessary for the Federal courts to accept the decision of the State courts construing the statutes creating the interest, and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest."

And see, *DeVaughn* v. *Hutchinson*, 165 U. S. 566, 570; *Warburton* v. *White*, 176 U. S. 484, 496.

stand it to be, it is in harmony with the Treasury Department's decisions with respect to minors. In cases of that type,[66] the Department *relies upon* the rule of property obtaining in most of the states,[67] to tax to the father the salary of an unemancipated minor child. In the case at bar the Government *seeks to avoid* the rule of property which makes half of the salary the income and property of the wife.

If the same rule is to be applied where title to income is the result of operation of law rather than of a transfer, then how are we to treat the converse case? To whom are the earnings of a wife in California to be taxed? They are unquestionably community property[68] and as such are as much subject to the management and control of the husband as any other community property.[69] It is clear, however, that such earnings are not liable for the husband's debts.[70] If we assume a case where the husband happened to have no income in a given year and his wife did have earnings, and we tax her one-half share to him, how can the tax be collected if those earnings are not subject to his debts?

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[66] Ever since 1917 the Treasury Regulations have provided that

> "In the absence of proof to the contrary a parent will be assumed to have the legal right to the earnings of the minor and must include them in his return."

Regs. 33 (Rev.) Par. 201; Regs. 45, 62, 65, 69—Art. 403; Regs. 74—Art. 383. cf. Office Decision 797, 4 C. B. 214; I. T. 2352, VI-1 C. B. 32.

[67] Louisiana apparently being an exception; see Sol. Mem. 2045 III-1 C. B. 231.

[68] California Civil Code, § 164, see Appendix, p. 44.

[69] id., § 172, see Appendix, p. 44.

[70] id., § 168, see Appendix, p. 44.

The Government suggests that if the taxpayers be upheld in these cases, it will mean that married persons in the community property states will be taxed upon their income at lower rates than married persons in other states.

In the Government's brief in *Smietanka* v. *First Trust & Savings Bank*,[71] we find the following:[72]

> "It has been suggested that to tax the income accumulated in the hands of fiduciaries without regard to the individual interest of beneficiaries may result in greater taxes being paid than if, the beneficiaries being ascertained, a tax was imposed separately on each individual's interest. It is, however, no objection to a tax law that the rate or amount of the tax varies under different conditions. (Knowlton *v.* Moore, 178 U. S. 41)."

In the present case it is the Government that is complaining of just such a situation, and regarding it as an evil.

In order to avoid this imagined evil, the Government asks that the court construe the Revenue Act out of its well-settled and obvious meaning. Even if the evil existed, it could not be cured by judicial amendment of the statute, any more than could the hardship complained of by the State of Florida[73] justify a declaration that the estate tax in the Revenue Act of 1926 was unconstitutional. As this Court then said:

> "Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the

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[71] 257 U. S. 602.

[72] See p. 26 of Government's brief in # 540, October term 1921.

[73] *Florida* v. *Mellon*, 273 U. S. 12.

various states *which necesarily work unlike results from the enforcement of the same Act.* (Italics supplied.)

If Florida thought that the other states had the advantage of her she was at liberty to conform her statutes and laws to theirs and thus receive similar benefits under the estate tax law. If a man loses money by betting at pari-mutuel race tracks in Louisiana, he may deduct his losses in computing his net income subject to tax.[74] But if he loses money at the races in Pennsylvania, he may not.[75] The courts do not equalize the effect of the state laws by especial construction of Federal statutes.

If New York or Massachusetts feel that the residents of California or Washington have, under the Revenue Acts, an unfair advantage over their own citizens, they can conform their statutes to those of the community property states.

But as a matter of fact the advantage is imaginary and is undoubtedly offset by many other differences between the laws of the different states. If husbands in the eastern states have to pay taxes on their entire earnings while husbands in the community property states divide their earnings with their wives, to be returned on two blanks, the benefit to the community husbands is at least offset by the advantage the non-community husbands have of being able to dispose of their earnings absolutely without restriction, by gift if they wish—which is certainly not true of husbands in California since 1891.

IX.

Congress can not constitutionally tax as the income of the husband that which, under the law of California, is the income and property of the wife.

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[74] Solicitor's Mem. 2680, III-2 C. B. 110; Solicitor's Mem. 2680a IV-1 C. B. 147.

[75] *Appeal of Frey*, 1 B. T. A. 338; *Appeal of McKenna*, 1 B. T. A. 326.

For the purposes of discussion, under this heading, let us assume that Congress had indicated an intention in the Revenue Act of 1928 to impose a tax on the whole of the salary as the income of the husband.

In every income tax case, there are present at least two questions: (1) Is that which is sought to be taxed "income"? (2) If so, is it the income of the person upon whom the tax is imposed? In this case it is conceded that the object of the tax is "income." But it is denied that it is the income "of" the husband, the person on whom the Government now seeks to impose the tax.

This Court has said that income is gain " '*derived*,' that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal."[6] An attempt to tax A with respect to the income of B would be as obviously in violation of the due process clause of the Fifth Amendment as an attempt to tax him with respect to B's land or a privilege exercised by B.

The idea that income must be taxed, if at all, to the owner thereof, was always regarded as fundamental until this Court cast a shadow of doubt by the language it used in the *Robbins* case. The *Robbins* decision, however, may be rested upon the ground that, under the Court's view of the California law as it existed in 1918, the community income involved therein was the property "of" the husband and, therefore, was taxable to him because Congress had imposed a tax "upon the net income of every individual." This is the view taken by the Circuit Court of Appeals in *Bender* v. *Pfaff*, *supra*. So construed, no violence is done to well-settled principles of constitutional law. We urge, therefore, that the Supreme Court did not intend to imply, in the last paragraph of the *Robbins* decision, that, even on the assumption that, under state law, the wife is the owner of one-half the community income, Congress has a choice between taxing

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[6] *Eisner* v. *Macomber*, *supra*.

it to her or taxing the entire community income to the husband as his income. That Congress could require a husband, in a community property state where the wife is the owner of half of the community income, to report such half as withholding agent for the wife, may perhaps be conceded. But it can not, we submit, require him to pay a tax computed on it *as his* income when it is *not in fact his* income.

X.

The Government's construction of the Revenue Act of 1926 would render it unconstitutional.

This Court has often held that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[77]

Is the Revenue Act of 1928 capable of a constitutional construction? We submit that not only is such the case, but also that it is only by doing violence to its language that it could possibly be construed as imposing, under the guise of an income tax, a tax upon a husband in the State of California with respect to something which, under the law of California, belongs, not to him, but to his wife.

Certainly the very most that could be said for the Government's position is that the 1928 Act is ambiguous. Assuming that to be the case, the rule of *Gould* v. *Gould*[78] applies. In that case the Supreme Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In

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[77] *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407–408; *Baender* v. *Barnett*, 255 U. S. 224.

[78] 245 U. S. 151.

case of doubt they are construed most strongly against the Government, and in favor of the citizen. *United States* v. *Wigglesworth*, 2 Story 369; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Benziger* v. *United States*, 192 U. S. 38, 55."

CONCLUSION

The Attorney General claimed that the taxability of a wife's share of community income to the husband was not a question of interpretation of Federal statutes, but of state law.[79] Only by taking this position could he justify authorizing the present litigations—for otherwise he would have been confronted by the rule governing re-enactments in the light of prior departmental construction—a rule which the Government would be the last to desire abandoned as a general proposition.

If he was correct in claiming that the issue here is purely one of state law—we submit that the amendments to the statutes of California, especially those of 1923 and 1927, which were not applicable in the *Robbins* case, make it clear that one-half of the income of a California marital community belongs to the wife, that her ownership therein is present, existing, and equal to that of the husband and that therefore it is the income "of" the wife and taxable to her, not to her husband.

It is therefore respectfully submitted that the first question certified by the Circuit Court of Appeals should be answered in the negative, and the second in the affirmative.

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[79] See p. 29, *supra*.

APPENDIX

Statutes Involved

REVENUE ACT OF 1928:

Section 11:

"There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: * * *."

Section 12:

"There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *."

Section 51:

"(a) Requirement.—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

"(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

"(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

"(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

"(b) Husband and wife.—If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

"(1) Each shall make such a return, or

"(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income."

Section 161:

"(a) Application of tax.—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

"(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

"(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

"(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

"(b) Computation and payment.—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 143."

Section 162:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—* * *

"(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the

beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

"(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

Section 181:

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity."

Section 182:

"There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year. * * *"

CALIFORNIA CIVIL CODE

Section 162:

"All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property."

CALIFORNIA CIVIL CODE (*Cont'd*)

Section 163:

"All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof is his separate property."

Section 164:

"All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property; * * *"

Section 167:

"The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband."

Section 168:

"The earnings of the wife are not liable for the debts of the husband."

Section 172:

"The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife." (Amendment, May 23, 1917.)

Section 172a:

"The husband has the management and control of the community real property, but the wife must

join with him in executing any instrument by which such community property or any interest therein is leased for a longer period than one year or is sold, conveyed, or encumbered * * *." (Amendment 1917—Stat. 1917, p. 829.)

Section 955:

"No assignment of, or order for wages or salary shall be valid unless made in writing by the person by whom the said wages or salary are earned and no assignment of, or order for, wages or salary made by a married person shall be valid unless the written consent of the husband or wife of the person making such assignment or order is attached to such assignment or order; and no assignment or order for wages or salary of a minor shall be valid unless the written consent of a parent or the guardian of such minor is attached to such order or assignment. No assignment of, or order for, wages or salary shall be valid unless at the time of the making thereof, such wages or salary have been earned, except for the necessities of life and then only to the person or persons furnishing such necessities of life directly and then only for the amount needed to furnish such necessities. And any power of attorney to assign or collect wages or salary shall be revocable at any time by the maker thereof."

Section 1401:

"Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of Section 1402." (Amended 1923—Stats. 1923, p. 30.)

Section 1402:

"Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allow-

ance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will." (Amended 1923.)

Section 2489:

"The general partners only have authority to transact the business of a special partnership."

Section 2492:

"In all matters relating to a special partnership, its general partners may sue and be sued alone, in the same manner as if there were no special partners."

Section 2500:

"The general partners in a special partnership are liable to the same extent as partners in a general partnership."

Section 2501:

"The contribution of a special partner to the capital of the firm, and the increase thereof, is liable for its debts, but he is not otherwise liable therefor, except as follows [describing acts which like §§ 2495 and 2502 in effect render him a general partner from point of view of creditors]."

CALIFORNIA INHERITANCE TAX ACT, AMENDED 1921.

Part of Section 1 (2):

"*provided* that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of Section 1402 of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act;"

CALIFORNIA INHERITANCE TAX ACT, AMENDED 1925.

Section 1 (2):

"* * * *provided* that for the purpose of this act, upon the death of the husband one-half of the community property is taxable under the provisions of this act; *provided, further*, that when the husband by testamentary disposition of the community property forces the surviving widow to elect whether to take under his will or by operation of law, the one-half or less of the community property, which the widow takes under the said will in lieu of the one-half belonging to her under the provisions of Section 1401 of the Civil Code shall not be taxable under the provisions of this act; * * *; *provided, further*, the one-half of the community property which belongs to the surviving spouse, under the provisions of Section 1401 of the Civil Code, and, in the case of the death of the wife, the community interest which goes to her husband under the provisions of Section 1402 of the Civil Code in the absence of her testamentary disposition thereof to another or others, shall not be deemed to pass to such surviving spouse as heir, but shall, for the purpose of this act, be deemed to go, pass or be transferred for a valuable consideration, and the said one-half of the community property and the interest last mentioned going as aforesaid to the surviving husband shall not be subject to the provisions of this act."

INCOME TAX RULING No. 2457, VIII-1 C. B. 89:

"Article 381: Individual returns.

"Revenue Acts of 1926 and 1928.

"An amendment of the Civil Code of California passed by the California Legislature, approved by the governor April 28, 1927, in effect July 29, 1927, reads as follows:

"Section 1. A new section is hereby added to the civil code to be known as section 161a thereof to read as follows:

"161a. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband, as is provided in sections 172 and 172a of the civil code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

"The Supreme Court of California in the case of *Stewart* v. *Stewart*, July 18, 1928 (269 Pac., 439), held that this section of the code, whatever effect it may have upon community property acquired subsequent to its effective date, can not in any manner relate to or govern the ownership of property acquired prior thereto.

"In view of section 161 (a) of the California Civil Code, and pending final adjudication in court of the question as to whether the Government may tax to the husband the entire community income which under the State law is under his management and control, husband and wife domiciled in California may each hereafter in rendering original separate returns report one-half of the income from community property acquired on and after July 29, 1927. Where community property was acquired prior to that date, the income therefrom may not be divided for income tax purposes but is taxable to the husband in its entirety, regardless of when such income is received. Husband and wife may hereafter report in original separate returns one-half of salaries, wages, and fees earned by either spouse on and after July 29, 1927, which are community property."

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No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA

v.

ROBERT K. MALCOLM

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

This case comes before the Court on certificate from the Circuit Court of Appeals for the Ninth Circuit. The District Court for the Northern District of California rendered no opinion.

JURISDICTION

The certificate of the Circuit Court of Appeals for the Ninth Circuit was filed on October 13, 1930. Jurisdiction is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS CERTIFIED

The questions certified are:

1. Under the applicable provisions of the Revenue Act of 1928, must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

2. Has the wife under Section 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?

STATUTES INVOLVED

The relevant portions of the statutes involved are printed in the Appendix, *infra*, pp. 11–24.

STATEMENT

The certificate (R. 1) sets forth the facts as follows:

> Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States. Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928 Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for Federal income tax purposes. Each reported one-

half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the returns. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid if, as a matter of law, they had a lawful right to make such separate returns under the provisions of Sections 11, 12, and 51 of the Revenue Act of 1928.

After the husband had filed his income-tax return for the calendar year 1928, as set out above, the Commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner. From a judgment for this amount in plaintiff's favor the defendant has appealed.

SUMMARY OF ARGUMENT

In the case of *United States* v. *Robbins*, 269 U. S. 315, this Court held that a married man domiciled with his wife in the State of California should be

taxed upon all of the community income. Since the decision in that case amendments to the California statutes have materially changed the rights and interests of the spouses in community property. Under these statutes the interest of the wife in California does not differ materially from similar property interests in Washington, Arizona, Texas, and Louisiana, and we believe that the decision in this case is, therefore, controlled by the community-property cases decided by the Court on November 24, 1930, in which the laws of the latter States were considered. *Poe* v. *Seaborn, Goodell* v. *Koch, Hopkins* v. *Bacon,* and *Bender* v. *Pfaff,* Nos. 15, 106, 84, and 86, October Term, 1930.

ARGUMENT

In the case of *United States* v. *Robbins,* 269 U. S. 315, this Court held that under Section 210 of the Revenue Act of 1918 (Act of February 24, 1919, c. 18, 40 Stat. 1057) a married man domiciled with his wife in the State of California should be taxed on all of the community income for the year 1918, including personal earnings of the husband and income from community property acquired before 1917.

The instant case involves taxation under Section 11 of the Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791) upon community income in the State of California consisting of the husband's salary for the year 1928. The Revenue Acts of 1918 and of 1928 in identical language lay a tax

upon "the net income of every individual," and the *Robbins case* would control decision in the instant case if the statutes of California relating to community property have not been so amended with relation to the wife's interest in the husband's salary as to bring this case within the ruling of this Court in *Poe* v. *Seaborn*, No. 15, October Term, 1930, decided November 24, 1930. But the California statutes which relate to community income received during 1928 are materially different from those before the Court in the *Robbins case*.

Section 172, as it appeared in the California Civil Code of 1872, provided as follows:

> The husband has the management and control of the community personal property, with the like absolute power of disposition other than testamentary as he has of his separate estate.

Prior to 1917 this provision had been amended by the addition of two provisos (Statutes and Amendments to the Codes, 1891, p. 425; Statutes and Amendments to the Codes, 1901, p. 598) as follows:

> *Provided, however,* that he can not make a gift of such community property or convey the same without a valuable consideration, unless the wife, in writing, consent thereto:
>
> And provided, also, that no sale, conveyance, or encumbrance of the furniture, furnishings, and fittings of the home, or of the clothing and wearing apparel of the wife or minor children which is community property

shall be made without the written consent of the wife.

In 1917 Section 172, without change in substance, was made to relate exclusively to personal property. (Statutes and Amendments to the Codes, 1917, p. 829.) At the same time there was added a new provision, Section 172a, which dealt with community real property as follows:

> SEC. 172a. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; *provided, however,* that the sole lease, contract, mortgage, or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate.

In 1921 Sections 172b, 172c, and 172d (*infra,* pp. 21–22) were enacted. These sections relate exclusively to the sale of community real estate in cases where either husband or wife has been adjudged insane.

In 1923 Sections 1401 and 1402 of the Civil Code (*infra*, pp. 23–24) were amended to provide that upon the death of either husband or wife one-half of the community property belongs to the survivor and one-half is subject to the testamentary disposition of the decedent; in the absence of a testamentary disposition the interest of the decedent passes to the surviving spouse. The community property passing from the control of the husband either by reason of his death or of his wife's testamentary disposition is subject to his debts, family allowances, and charges and expenses of administration.

Finally, in 1927, Section 161a of the Civil Code was enacted. This section provides:

> The respective interests of the husband and wife in community property during continuance of marriage relation are present, existing, and equal interests under the management and control of the husband as is provided in Sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

Section 172a was amended in 1927 (see p. 20, *infra*), the chief change being in connection with the limitation of one year on suits to avoid any instrument affecting property standing of record in the name of the husband alone.

We believe that under the California statutes as amended the rights and interests of the

wife in community income earned by the husband in 1928 do not differ materially from the wife's rights and interests in community income under the laws of Washington, Arizona, Texas, and Louisiana, and that the instant case is governed not by the *Robbins case* but by the decisions of this Court in *Poe* v. *Seaborn,* No. 15; *Goodell* v. *Koch,* No. 106; *Hopkins* v. *Bacon,* No. 84; and *Bender* v. *Pfaff,* No. 86, all on the docket of the October Term, 1930, and all decided November 24, 1930.

In California, on the death of either spouse his or her interest is subject to testamentary disposition as in Washington. The chief difference in this respect between the law in the two States is that in California in the absence of testamentary disposition, the interest of the deceased spouse goes to the surviving spouse, while in Washington it passes to the issue of the decedent. The husband in California can not make a gift of the community personal property without the written consent of his wife (Civil Code, Sec. 172), and the wife must join with the husband in executing any instrument conveying an interest in community real estate. (Civil Code, Sec. 172a.) And finally the interests of the husband and wife are declared by the legislature to be "present, existing, and equal." (Civil Code, Sec. 161a.) Although there are differences in detail between the rights of the wife in California and those of wives in Washington, Arizona, Texas, and Louisiana, we believe that it can not now be contended that the wife in Cali-

fornia is not the "owner" of one-half of the community property.

The income involved in the instant case was salary earned in 1928 after the enactment of the statutes referred to above, and, consequently, the question of who should pay the tax on other income is not presented in the instant case. The courts of California have held that the statutes outlined above do not affect the ownership of community property acquired before their passage. Thus, the 1917 amendments as to real estate do not affect community real estate acquired by husband and wife prior to that time. *Schubert* v. *Lowe,* 193 Cal. 291; *Staton* v. *Buster,* 79 Cal. App. 428. Nor do they apply to community real estate purchased after their adoption with community funds acquired prior thereto. *Roberts* v. *Wehmeyer,* 191 Cal. 601. In *Estate of Phillips,* 203 Cal. 106, it was held that the portion of Section 1401 of the Civil Code which gave the wife the right to make a testamentary disposition of one-half the community property could not apply to community property acquired by the spouses prior to its enactment. See also *McKay* v. *Lauriston,* 204 Cal. 557. And in *Stewart* v. *Stewart,* 204 Cal. 546, it was held that Section 161a of the Civil Code adopted in 1927 could have no effect on the ownership of community property acquired prior to its effective date.

The question of who should pay the tax on the income from community property acquired before

1917 is settled by the *Robbins* case. The question of who should pay the tax on the income from community property acquired since 1917 but before 1927 is not involved in the instant case and is still open for determination.

CONCLUSION

The questions certified by the Circuit Court of Appeals, which should be limited upon the facts recited in the certificate as having reference only to income consisting of earnings received in 1928, are submitted for the decision of this Court.

Respectfully submitted.

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ERWIN N. GRISWOLD,
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DECEMBER, 1930.

APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1928, c. 852, 45 Stat. 791, 795, 796, 807–808, provides in part as follows:

> SEC. 11. NORMAL TAX ON INDIVIDUALS.—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following: * * * (U. S. C., Sup. III, Title 26, Sec. 2011.)
>
> SEC. 12. SURTAX ON INDIVIDUALS.—(a) *Rates of surtax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * * (U. S. C., Sup. III, Title 26, Sec. 2012.)
>
> SEC. 51. INDIVIDUAL RETURNS.—(a) *Requirement.*—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—
>
> (1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;
>
> (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and
>
> (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) *Husband and wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income. (U. S. C., Sup. III, Title 26, Sec. 2051.)

CALIFORNIA STATUTES

California Civil Code (1872):

SEC. 136[1] (as amended). Though judgment or divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them.

SEC. 137[2] (as amended). When an action for divorce is pending, the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary to enable the wife, or husband, to support herself and her children, or to support himself and his children, as the case may be, or to prosecute or defend the action. When the husband or wife wilfully deserts the wife or husband, as the case may be, or when the husband or wife has any cause of action for divorce as provided in section 92 of this code, he or she may, without applying for divorce, maintain in the superior court an action against her or him

[1] Amended in 1905, Statutes and Amendments to the Codes, 1905, p. 634.

[2] Amended in 1927, Statutes and Amendments to the Codes, 1927, p. 441.

for permanent support and maintenance of himself or herself or of himself and children, or of herself and children. When the husband wilfully fails to provide for the wife, she may, without applying for divorce, maintain in the superior court an action against him for permanent support and maintenance of herself or of herself and children. During the pendency of an action for divorce the court may, in its discretion, require the husband or wife, as the case may be, to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The court, in granting the husband or wife permanent support and maintenance of himself or herself, or of himself and children or herself and children, in any such action, shall make the same disposition of the community property and of the homestead, if any, as would have been made if the marriage had been dissolved by the decree of a court of competent jurisdiction. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court.

SEC. 139. Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife, for her support during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

SEC. 140[3] (as amended). The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case.

SEC. 141. In executing the five preceding sections the court must resort:

1. To the community property; then,

2. To the separate property of the husband.

SEC. 142. When the wife has either a separate estate, or there is community property sufficient to give her alimony or a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

SEC. 143. The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just.

SEC. 146[4] (as amended). In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows:

1. If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

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[3] Amended in 1927, Statutes and Amendments to the Codes, California, 1927, p. 441.

[4] As amended in 1874, Amendments to the Codes, California, 1873–1874, pp. 191–192.

2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties.

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely, or for a limited period, subject in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party.

SEC. 147[4] (as amended). The court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead, as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

SEC. 148[4] (as amended). The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

SEC. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between

[4] As amended in 1874, Amendments to the Codes, California, 1873–1874, pp. 191–192.

themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

SEC. 159[5] (as amended). A husband and wife can not, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

SEC. 160. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

SEC. 161. A husband and wife may hold property as joint tenants, tenants in common, or as community property.

SEC. 161a.[6] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided by sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property.

SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

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[5] As amended in 1874, Amendments to the Codes, California, 1873–1874, p. 193.

[6] Enacted in 1927, Statutes and Amendments to the Codes, California, 1927, p. 484.

SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 164 [7] (as amended). All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is community property; but whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing the presumption is that the same is her separate property, and if acquired by such married woman and her husband, or by her and any other person, the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; and the presumptions in this section mentioned are conclusive in favor of a purchaser, encumbrancer, payor, or any other person dealing with such married woman, in good faith and for a valuable consideration. In cases where a married woman has conveyed, or shall hereafter convey, real property which she acquired prior to May 19, 1889, the husband, or his heirs or assigns, of such married woman, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances

[7] Enacted in 1927, Statutes and Amendments to the Codes, California, 1927, pp. 826–827.

heretofore made, from and after one year from the date of the taking effect of this act; and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

SEC. 165. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside.

SEC. 166[8] (as amended). The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife.

SEC. 167[8] (as amended). The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband.

SEC. 168. The earnings of the wife are not liable for the debts of the husband.

SEC. 169. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

SEC. 170. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

SEC. 171[9] (as amended). The separate property of the wife is liable for her own

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[8] As amended in 1874, Amendments to the Codes, California, 1873–1874, p. 193.

[9] Amended in 1915, Statutes and Amendments to the Codes, California, 1915, p. 920.

debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that the separate property of the wife is liable for the payment of debts contracted by the husband or wife for the necessaries of life furnished to them or either of them while they are living together; provided, that the provisions of the foregoing proviso shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise, succession, or gift, other than by gift from the husband, after marriage.

SEC. 171a[10] (as amended). For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist.

SEC. 172[11] (as amended). The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

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[10] Added in 1913, Statutes and Amendments to the Codes 1913, p. 217.

[11] Amended in 1917, Statutes and Amendments to the Codes, California, 1917, p. 829.

SEC. 172a [12] (as amended). The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect.

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[12] Amended in 1927, Statutes and Amendments to the Codes, California, 1927, p. 827.

SEC. 172b.[13] Where real property is held as community property, and either the husband or wife has been adjudged insane or incompetent, the husband or wife not insane or incompetent may petition the superior court of the county in which such community real property is situated for an order permitting the husband or wife, not insane or incompetent, to sell and convey, mortgage or lease, such community real property to raise moneys to provide for the support and care either of the sane or insane or incompetent spouse, or of their minor children, and also to raise moneys for the payment of the necessary taxes, interest and other charges incurred and required to be paid for the protection and preservation of the community estate and whenever it appears it is for the advantage, benefit, and best interests of the spouses, the estates, or their dependents. Such petition must be subscribed and sworn to by the applicant, setting forth the name and age of the insane or incompetent husband or wife; a description of the premises constituting the community real property petitioned to be sold, mortgaged, or leased; the value of same; the county in which it is situated; and such facts, in addition to the insanity or incompetency of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition.

SEC. 172c.[13] Notice of the application for such order must be given by publication of the same in a newspaper published in the county in which such community real prop-

[13] Enacted in 1921, Statutes and Amendments to the Codes, 1921, pp. 91–92.

erty is situated, if there is a newspaper published therein, once each week for three successive weeks, prior to the hearing of such application * * *.

SEC. 172d.,[14] If it appears to the court that such husband or wife has been adjudged insane or incompetent, the court may make an order permitting the husband or wife, not insane or incompetent, to sell and convey, or mortgage or lease such community real property, and thereafter any sale, conveyance, mortgage or lease, made in pursuance of such order is as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, mortgage or lease. If a sale is ordered it must be reported to and confirmed by the court.

SEC. 173. No estate is allowed the husband as tenant by courtesy [curtesy] upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

SEC. 174[15] (as amended). If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

SEC. 175[15] (as amended). A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support

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[14] Enacted in 1921, Statutes and Amendments to the Codes, 1921, pp. 91–92.

[15] As amended in 1874, Amendments to the Codes, 1873–1874, pp. 193–194.

when she is living separate from him, by agreement, unless such support is stipulated in the agreement.

SEC. 176[15] (as amended). The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself.

SEC. 177. The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

SEC. 178. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

SEC. 179. When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

SEC. 180. The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.

SEC. 1401[16] (as amended). Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code.

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[15] As amended in 1874, Amendments to the Codes, 1873–1874, pp. 193–194.

[16] Amended in 1923, Statutes and Amendments to the Codes, California, 1923, pp. 29–30.

SEC. 1402[17] (as amended). Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will.

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[17] Amended in 1923, Statutes and Amendments to the Codes, California, 1913, pp. 29–30.

U. S. GOVERNMENT PRINTING OFFICE: 1938



UNITED STATES *v.* MALCOLM.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 512. Submitted January 12, 1931.—Decided January 19, 1931.

1. Under the Revenue Act of 1928, the entire community income of a husband and wife, domiciled in California, need not be returned and the income tax thereon be paid by the husband.
2. Under § 161 (a), California Civil Code, the wife has such an interest in the community income that she should separately report and pay the tax on one-half of it.

The certificate from the court below stated the facts as follows:

"Robert K. Malcolm and Esther Jarrett Malcolm are husband and wife and citizens of the United States.

Since October 1, 1920, they have continuously maintained their domicile in the State of California. During the year 1928, Robert Malcolm received a salary of $3,600 for personal services rendered as an officer of the Liberty Farms Company, a California corporation. Under the laws of the State of California, this income was community property. On March 1, 1929, the husband and wife filed separate returns of their income for federal income-tax purposes. Each reported one-half of the salary of $3,600 received in 1928 by the husband, and each fully paid the amount shown to be due on the return. It is admitted that all income taxes due from either husband or wife for the year 1928 have been fully paid, if, as a matter of law, they had a lawful right to make such separate returns under the provisions of §§ 11, 12, and 51 of the Revenue Act of 1928.

"After the husband had filed his income-tax return for the calendar year, 1928, as set out above, the Commissioner, upon an audit and examination, determined that his return was incorrect in that the salary of $3,600 should have been reported by the husband alone, and an income tax paid thereon by him, instead of both husband and wife reporting it at $1,800 on each return. Accordingly the Commissioner determined against the husband a deficiency in income tax amounting to $18.39. An assessment in this amount was then made and collected from the husband, the plaintiff herein, together with interest amounting to $1.12. A claim for refund was thereafter filed and rejected by the Commissioner. From a judgment for this amount in plaintiff's favor, the defendant has appealed."

The questions certified were as follows:

"1. Under the applicable provisions of the Revenue Act of 1928 must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?

"2. Has the wife under § 161 (a) of the Civil Code of California such an interest in the community income that she should separately report and pay tax on one-half of such income?"

Solicitor General Thacher, Assistant Attorney General Youngquist, Mr. Sewall Key and *Miss Helen R. Carloss*, Special Assistants to the Attorney General, and *Mr. Erwin N. Griswold* submitted for the United States.

The Government conceded that, with respect to the particular income here in question, the interests of the husband and wife were such as to bring the case within the rulings which are cited in the *per curiam* decision, *infra*—this because of amendments of the California statutes made since *United States* v. *Robbins*, 269 U. S. 315 was decided.

Messrs. Kingman Brewster, James S. Y. Ivins, Allen G. Wright, A. J. Hill, O. R. Folsom-Jones, Joseph D. Brady, and *F. E. Youngman* submitted for Malcolm.

PER CURIAM. The first question certified is answered: No. The second question is answered: Yes. *Poe* v. *Seaborn, ante*, p. 101; *Goodell* v. *Koch, ante*, p. 118; *Hopkins v. Bacon, ante*, p. 122.